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No. 92-1356

IN THE

Supreme Court of the United States

October Term, 1992

LINCOLN E. SMITH,

Petitioner,

v.

CITY OF BOSTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 3, 1993

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Question Presented

Whether the evidence supported the determination by the Superior Court and the Supreme Judicial Court of the Commonwealth of Massachusetts that a subordinate's isolated decision to terminate petitioner in violation of municipal policies was an abuse of discretion and not a decision that was reflective of municipal policy when there was no evidence presented to show that the municipal policymaker ratified the decision and the basis for it, other than the fact that petitioner informed the Mayor of the termination sometime after the fact and the Mayor did not overturn the decision.

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Opinions Below

The Opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported at 413 Mass. 607 (1992) and is reproduced in the Appendix to the Petition (A-1, A-16).

Jurisdiction

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(a) and respondent is satisfied with this statement of jurisdiction except to point out that the date of the entry of judgment of the state court case petitioned to be reviewed is November 5, 1992.

Statement of the Case

Respondent is satisfied with the petitioner's statement of the case insofar as it is quoted verbatim from the state decision. Respondent would add that at the close of the petitioner's evidence, the trial judge granted the respondent's Motion For Directed Verdict. Further, at the close of all evidence, petitioner presented a written motion for reconsideration of the trial judge's allowance of directed verdict in the respondent's favor, which was denied. Petitioner also filed a motion for a new trial to reconsider the allowance of the directed verdict. That motion was denied.

Petitioner timely filed an appeal of his Federal and State civil rights claims to the Appeals Court of the Commonwealth of Massachusetts and the Supreme Judicial Court transferred the appeal *sua sponte* (A-19). The State civil rights claims were deemed to be abandoned by petitioner as he failed to raise the argument in his appellate brief (A-5). Judgment was affirmed for the City (A-17).

Reasons for Denying the Writ

PETITIONER PRODUCED NO EVIDENCE TO SHOW THAT THE MUNICIPAL POLICYMAKER, THE MAYOR, RATIFIED AN ISOLATED DISCRETIONARY DECISION OF A SUBORDINATE TO TERMINATE THE PETITIONER IN VIOLATION OF MUNICIPAL POLICY AND RATIFIED THE BASIS FOR THAT DECISION.

The petitioner has improperly characterized the evidence presented at trial in an effort to challenge the legal basis of the verdict below. The decision of the Massachusetts Supreme Judicial Court is entirely consistent with the legal principles enunciated in this Court's cases dealing with municipal liability under 42 U.S.C. § 1983.

Thus, neither federal nor constitutional law will be advanced by having this Court review such determinations.

Despite the petitioner's effort to portray this case as one in which the municipality was able to insulate itself from liability in spite of a delegation of authority and a review by the final policymaker of the subordinate's decision, the facts show that there was no delegation of final policymaking authority nor did the Mayor as final policymaker ratify the decision to subject the municipality to liability (A. 3, A. 9-A-12).

"Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official — even a policymaking official — has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Pembaur* v. *Cincinnati*, 475 U.S. 469, 481 (1986).

Petitioner inaccurately states that there was a delegation of authority to hire and fire from the final policymaker to his subordinates. However, using the standard articulated in *St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988), of looking to state and local laws to determine who is the final policymaker, the Supreme Judicial Court held that based on the city's ordinances and written city policies, there was no question that the Mayor had final policymaking authority in the area of personnel selection and the supervisor of personnel had at most an advisory role. While the supervisor of Personnel had the discretion to hire and fire, his authority was nevertheless constrained by municipal policies (including an Executive Employment Manual). *Smith* v. *City of Boston*, 413 Mass. 607, 614 (1992); *see Pembaur* v. *Cincinnati*, 475 U.S. 469, 483 n.12 (1986). Thus, there was no delegation of authority.

The petitioner then seeks to persuade this Court that the meeting held seven days after the termination was a ratification of the basis for the decision to terminate under *Praprotnik*.

"42 U.S.C. § 1983 imposes liability only on a person who subjects or causes to be subjected any individual to a deprivation of federal rights. This cannot easily be read to impose liability vicariously on government bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Pembaur* v. *Cincinnati*, 475 U.S. at 478.

The mere fact that the municipal policymaker for respondent City of Boston [the Mayor] met with the petitioner, his City Councillor and Robert Consalvo [Supervisor of Personnel] seven days after petitioner's termination at petitioner's and the City Councillor's request is not the type of custom, policy or practice which subjected the petitioner to a deprivation of his constitutional rights, i.e., the loss of his job under *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

Nor can this meeting remotely be deemed a ratification of the subordinate's decision and the basis for it. There is no evidence to support plaintiff's undocumented assertion that the Mayor "reviewed" the decision to terminate. The only evidence presented to the lower court which the Supreme Judicial Court of Massachusetts cited in its decision was that a meeting took place and that one of the Mayor's executive assistants told petitioner that there was another municipal job available if he applied for it (A. 4).

These facts show at best that the Mayor failed to investigate the decision and simply went along with it. The failure to investigate one termination by a subordinate does not make an "official municipal policy" subjecting the municipality to liability, especially where, as here, the Supreme Judicial Court determined the subordinate's "illegal acts to be deplorable and to rest squarely upon his own shoulders." *Smith* v. *City of Boston*, 413 Mass. 607, 617; *see St. Louis* v. *Praprotnik*, 485 U.S. at 130.

There was no evidence that the Mayor approved of the basis of the decision. Granting petitioner's and the City Councillor's

request to meet with him should not automatically be deemed ratification without more, for then the situation would be created where anything the chief policymaker did or did not do would be deemed a review and ratification if the subordinate's position was not changed to the complainant's satisfaction. Arguably, the petitioner could have brought this same petition before this Court if the Mayor had denied his request for a meeting, deeming the denial to constitute a ratification of the decision. Petitioner is thus seeking the Court to find municipal liability on any action undertaken by the Mayor other than overturning the decision to terminate him, or respondent superior.

This point has previously been addressed by this Court:

> In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city could have done to prevent the unfortunate incident . . . thus resulting in *de facto respondeat* superior liability on municipalities.

Canton v. *Harris*, 489 U.S. 378, 392 (1989); *see also Oklahoma City* v. *Tuttle*, 471 U.S. 808, 823 (1985) ("Obviously, if one retreats far enough from a constitutional violation, some municipal policy can be identified behind almost any such harm inflicted by a municipal official").

In addition, the element of causation between the meeting with the Mayor and petitioner's termination is totally lacking.

> In order to subject the municipality to liability, the government policy must in and of itself cause the violation . . . it is only when the execution of the government's policy or custom inflicts the injury that the municipality may be held liable under § 1983.

Canton v. *Harris*, 489 U.S. 378, 385 (1989); *see also Praprotnik*, 485 U.S. at 122 ("governments should be held responsible when, and only when, their official policies cause their employees to violate another person's constitutional rights").

The plaintiff has shown no nexus between the event at issue [his termination] and a meeting with the Mayor post termination. The Mayor did not terminate the plaintiff or give prior approval to his termination. The most that can be said is that the Mayor became aware of his subordinate's decision and acquiesced by not intervening, which does not implicate municipal liability under *Pembaur* or *Praprotnik*.

Since *Monell*, the Supreme Court has emphasized that the "subjects or causes to be subjected" language of 42 U.S.C. § 1983 requires that the governmental policy must be so tied to the challenged acts that it can be said to be the "moving force of the constitutional violation." *Bibbo* v. *Mulhern*, 621 F.Supp. 1018, 1027 (D. Mass. 1985), *citing City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 823 n.8 (1985).

It is also important to note in *Pembaur* that the policy complained of arose when defendant employees directly sought explicit orders and instructions from the supervisor on forcibly entering a health clinic without a warrant to arrest two occupants. *Pembaur*, 475 U.S. at 473. Such was not the case here, as the subordinate's actions were taken without the Mayor's prior knowledge. *See also Melton* v. *City of Oklahoma City*, 879 F.2d 706, 725 (10th Cir. 1989) (City was held liable for ratification when the termination was discussed with and approved by the Mayor prior to its occurrence).

The *Bordanaro* case, cited by petitioner on page 8 of his petition wherein the municipality was held liable through the actions or inactions of its police chief and mayor, contains a vastly different scenario. In *Bordanaro*, the police supervisors admitted during testimony to an egregious custom and practice over decades, of "longstanding, widespread and facially uncon-

stitutional police practices" which led to an incident where the entire night shift of the city police department engaged in an episode of excessive force based on the longstanding customs. The court held that "constructive knowledge may be evidenced by the fact that the practices have been so widespread or flagrant that in the exercise of their official responsibilities, the municipal policymakers should have known of them." *Bordanaro* v. *McLeod*, 871 F.2d 1151, 1156-1157 (1st Cir. 1989).

The evidence presented in *Smith* v. *Boston* falls far short of the outrageous facts of *Bordanaro*. As the Court stated, petitioner cited no other incidents but his own such that no pattern or custom of similar occurrences was established. *Smith*, 413 Mass. at 616. Thus, no constructive knowledge could be imputed to the Mayor.

It is thus clear that there was no evidence presented by the petitioner in his case to show that the chief policymaker, hence the municipality, caused his termination.

Conclusion.

For all of the above reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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